Filed 1/25/19 P. v. Holliday CA2/4

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. ERIC DESHAWN HOLLIDAY, Defendant and Appellant.	B284342 (Los Angeles County Super. Ct. No. NA099163)

APPEAL from a judgment of the Superior Court for Los Angeles County, Laura L. Laesecke, Judge. Affirmed in part, reversed in part, and remanded.

Julie Schumer, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Scott A. Taryle and David W. Williams, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Eric Deshawn Holliday appeals from a judgment sentencing him to an indeterminate term of 15 years to life in prison, plus a determinate term of 44 years and four months, following a bifurcated jury and court trial. The jury convicted him of attempted first degree murder (Pen. Code,[1] §§ 664/187, subd. (a)), three counts of assault with a firearm (§ 245, subd. (a)(2)), and possession of a firearm by a felon (§ 29800, subd. (a)(1)), and found gang allegations (§ 186.22, subd. (b)(1)(C)) and firearm allegations (§§ 12022.5, 12022.53, subds. (b), (c)) as to certain counts to be true. The trial court found that defendant had suffered prior felony convictions and served prior prison terms. (§§ 667, subd. (a)(1), 667.5, subd. (b).)

On appeal, defendant contends: (1) the true finding on the gang allegations is not supported by sufficient evidence; (2) reversal of the gang enhancement is required under *People v. Sanchez* (2016) 63 Cal.4th 665 (*Sanchez*) due to the admission of case specific testimonial hearsay regarding defendant's membership, and the membership of offenders of the predicate offenses, in a gang; (3) there was insufficient evidence to support the attempted murder count; (4) there was insufficient evidence to support the assault with a firearm count as to two of the victims; (5) the matter must be remanded for resentencing to allow the trial court to exercise its discretion to strike the firearm enhancements; and (6) the prior prison term enhancement must be

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1 Further undesignated statutory references are to the Penal Code.

stricken for one of his convictions because that conviction was reduced to a misdemeanor under Proposition 47.[2]

The Attorney General agrees that the matter must be remanded for resentencing regarding the firearm enhancements and that one of the two prior prison term enhancements must be stricken. The Attorney General also noted in the respondent's brief that although the trial court imposed two two-year out-on-bail enhancements under section 12022.1, no findings were made to support those enhancements; it therefore asks that the matter be remanded to allow the trial court to conduct further proceedings as to those enhancements. Defendant contends that those enhancements must be stricken because no proof to support them was ever presented by the prosecution.

We conclude: (1) substantial evidence supports the attempted murder and assault with a firearm counts, as well as the gang enhancement; (2) although admission of some of the gang expert's testimony regarding gang membership was erroneous under *Sanchez*, the error was harmless in light of non-prohibited testimony; (3) the prior prison term enhancement as to one of the prior convictions must be stricken; (4) the matter must be remanded to allow the trial court to conduct further proceedings as to the out-on-bail enhancements; and (5) the matter also must be remanded to allow the trial court to exercise its discretion regarding whether to strike the firearm enhancements.

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[2] Defendant's sixth contention was raised in a supplemental brief filed after defendant's conviction in that prior case was reduced, which was after the completion of regular briefing in this appeal.

BACKGROUND

A. *Charges in the Operative Information*

In a fourth amended information, defendant was charged with attempted first degree murder of Derold Loadholt (Earl Peyton) (count 1), assault with a firearm on Tramir P. (count 4), possession of a firearm by a felon (count 5), assault with a firearm on Tatiana Gaines (count 6), and assault with a firearm on Derald Loadholt (Earl Peyton) (count 7).[3] The information also alleged: (1) a gang enhancement under section 186.22, subdivision (b)(1)(C) as to counts 1, 4, 6, and 7; (2) a gang enhancement under section 186.22, subdivision (b)(1)(A) as to count 5; (3) firearm enhancements under section 12022.53, subdivisions (b) and (c) as to count 1; (4) firearm enhancements under section 12022.5, subdivision (a) as to counts 4, 6, and 7; (5) out-on-bail enhancements under section 12022.1 as to all counts; and (6) two prior prison term enhancements under section 667.5, subdivision (b).

B. *Evidence Presented to the Jury and the Verdict*[4]

1. *Events Leading Up to the Shooting*

In March 2014, Earl Peyton[5] was at the Long Beach courthouse with a woman he was dating. He and the woman were attending a

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[3] Counts 2 and 3 were dismissed in an earlier iteration of the information.

[4] Defendant did not testify and did not present any witnesses.

[5] Peyton's adopted name is Derald Loadholt, but he does not use it; Earl Peyton is his birth name.

court proceeding involving the woman's son. Defendant's wife's son was involved in that same court proceeding, and defendant and his wife also attended the proceeding. After the proceeding, the two women got involved in a verbal altercation outside the courthouse. Peyton was trying to defuse the situation between the women when defendant approached and "banged on" Peyton, telling Peyton that he was from Carver Park. Defendant was acting aggressively, and Peyton instinctively responded by telling him that he was a Blood from up north. Peyton thought they were going to fight, but defendant walked away.

2. *The Shooting*

The next time Peyton saw defendant was on May 4, 2014. Peyton was at the Carmelitos Housing Project in Long Beach, where he lived at the time. Peyton's youngest son, Tramir (who was five years old), and Tramir's mother, Tatiana Gaines, had been visiting, and Peyton was walking them to Gaines's car in the parking lot. As they were walking, Peyton noticed someone walking toward him from his blind side. He turned and looked, and saw it was defendant.[6]

Remembering the confrontation at the courthouse, Peyton thought there might be trouble, and his main concern was to get his family into the car for safety. As he was putting Tramir into his car seat in the back seat of the car, he noticed that defendant had stopped at a diagonal from him. Once Tramir was in the car, Peyton took off his

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[6] Defendant's wife's family also lived in the Carmelitos Housing Project.

shirt, getting ready to fight. He and defendant exchanged words -- saying things like "What's up?" or "What's happening? What[] is going on? What's the deal?" -- and Peyton started to approach defendant. Defendant pulled a gun out of a bag he was carrying and pointed it at Peyton. Peyton put his hands up and asked defendant if he was going to shoot him in front of his family. Peyton then said, "Let's get down. Put the gun down." Defendant responded, "On Carver Park, we ain't going to do too much talking," and he started shooting, holding the gun straight out, toward Peyton. Defendant was about 22 feet away from Peyton when he started shooting.

Peyton started walking backwards, trying to get as far from defendant as he could, and trying to get between cars to shield himself. Defendant ran up to the trunk of Gaines's car; Peyton was at the front of the car, moving back and forth trying to avoid the aim of the gun. Defendant fired at least one shot when they were in this position.

Gaines, who was watching the events in her rearview and side mirrors, had seen Peyton walk toward defendant and saw them having words, but she could not hear what they were saying because the car doors and windows were closed. When she saw defendant pull the gun out of the bag and start shooting, she told Tramir to get down, and she tried to duck down in the front seat.[7] Tramir also saw defendant pull a

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[7] At trial, Gaines was asked on cross-examination if the gun was pointed down at Peyton's feet. She responded that she did not know; she only knew that it was pointed at Peyton. She admitted, however, that she had told the prosecutor and the detective the week before trial that it looked like defendant was shooting toward Peyton's feet. She reiterated, however, that she was only watching through the side mirror and was ducking down.

gun out of a bag. When he started shooting, Tramir got down under the car seat; he thought defendant was going to shoot him.

After defendant shot across Gaines's car, Peyton decided to run towards the street, in order to draw defendant away from his family. As he ran, defendant fired one or two more shots at him. When he did not hear any more shots, he turned around and saw defendant running back toward the parking lot. Afraid for his family, Peyton ran back to try to protect them. When he got to the parking lot, he saw defendant jumping into a black Honda.[8] By that time, Gaines had turned her car to face the exit of the parking lot. Peyton yelled at her to leave, so she did, turning right out of the exit. In her rearview mirror, she saw Peyton start to run in the opposite direction. Defendant backed his car out of his parking space and exited the parking lot, turning left. He passed Peyton, then went in reverse and stopped, fired at least one more shot at Peyton through the passenger window, and drove off.

3. *The Investigation*

While the shooting was happening, the Long Beach Police Department received 911 calls from two residents of the Housing Project reporting the shooting. Recordings of the calls were played for the jury. One of the callers said that four shots were fired, at which point she reported that additional shots had just been fired from a black

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[8] According to Peyton, the car was a Honda Civic; according to Gaines, it was a Honda Accord. The car did not have license plates.

compact car. That caller also reported that she heard the shooter say "they was going to kill him" as he was shooting out of the car.

Long Beach Police Officer Jeremy Boshnack was dispatched to the scene. As he was driving to the parking lot he was flagged down by Peyton, who told him that someone shot at him. Officer Boshnack conducted a walk-through of the area and discovered a bullet hole in a vehicle on the street in front of the parking lot, and a bullet fragment underneath that car. He also inspected Gaines's car (she had returned to the parking lot when she saw the police approaching), and did not see any bullet strikes.

On May 15, 2014, Long Beach police conducted a traffic stop of defendant's car, a black Honda Accord with no license plates. The car was searched, and a loaded Smith & Wesson Revolver and three live rounds in a plastic baggie were found.

4. *Gang Expert's Testimony*

Deputy Scott Giles of the Los Angeles County Sheriff's Department testified as a gang expert. At the time of trial, he was assigned to the gang unit at Century station as an investigator. He described his experience and training with regard to gangs, and stated that in his current assignment, and when he was a patrol deputy in Compton, he handled many cases involving gangs in the Willowbrook area, including numerous cases involving Carver Park members as victims or suspects.

After providing general background on gangs and how they operate, he addressed the Carver Park Compton Crips gang specifically.

He testified that the gang had been around since the early to mid-1980s, and as of May 4, 2014, it had approximately 120 members, 80 of whom were active members. The types of crimes the Carver Park gang has committed include murder, assaults (including assaults with deadly weapons and firearms), attempted murders, carjackings, robberies, narcotic sales, and possession of firearms by felons. Their primary color is blue, and they use a distinctive "C" logo. Their tattoos include the "C" logo, "CP," "CC," "Carver Park," and "118th."[9] They use the hand sign "CC" (i.e., forming the letter "C" with each hand). Their territory is in Compton, the Willowbrook area, and an unincorporated area of Los Angeles.

a. *Testimony Regarding Predicate Offenses*

Deputy Giles opined that members of Carver Park have engaged in a pattern of criminal gang activity, and testified about four criminal convictions, involving three different offenders; the prosecution offered the dockets from those cases into evidence.

i. *Malcolm Jackson*

Two of the cases involved Malcolm Jackson. In the first case, Jackson was convicted of robbery on February 10, 2011. In the second case, he was convicted of possession of a firearm by a felon on December 17, 2015. Deputy Giles opined that Jackson is a member of the Carver Park Compton Crips gang. When asked for the basis of his opinion, he testified that it was "[f]rom personal contacts I've had with him, and

[9] Carver Park is located on 118th Street and Success in Willowbrook.

also talking to [the detective on one of the cases]." He also testified that he reviewed field identification (FI) cards and police reports.

ii. *David Johnson*

David Johnson was convicted of attempted murder on January 12, 2010. When Deputy Giles was asked for the basis of his opinion that Johnson is a member of the Carver Park gang, he stated that he relied upon the police report in the case and his discussion with the gang expert. He testified, based upon those reports and discussion, that the crime was committed with other documented members of the Carver Park gang.

iii. *Robert Earl Thomas, III*

Robert Earl Thomas was convicted of first degree murder on July 16, 2014. Deputy Giles testified that he was familiar with Thomas "through other investigations [in which] his name came up, . . . his conviction, [and talking with] the gang expert on that case." He also conducted his own investigation of Thomas, and came across postings on social media in which Thomas showed pictures of Carver Park and was "throwing up gang signs." Based upon this information, as well as FI cards, Deputy Giles opined that Thomas was a member of the Carver Park gang.

b. *Testimony Regarding Defendant*

Deputy Giles was asked how he was familiar with defendant. He responded that he did some research into defendant's gang affiliation by looking at his booking photos, FI cards, and police reports, and spoke with other officers. He stated that one of the FI cards from 2008 stated

that defendant identified himself as a member of Carver Park. Deputy Giles also was shown photographs of defendant's tattoos, and he identified several tattoos associated with the Carver Park Compton Crips gang. Those tattoos included: (1) "Waydah," which is a Carver Park greeting; (2) "11" on one arm and "8" on the other, which signifies 118th Street, where Carver Park is located; (3) "Parc," which stands for Carver Park (because it is a Crips gang, they substitute a "c" for the "k" in park); (4) "East," which is used by Carver Park members because Carver Park is on the east side of Main Street; (5) "C," which denotes Carver Park or Compton Crips; (6) "Carver or Nothing"; (7) "Pizza Hut Killa," which uses a derogatory name used by Carver Park members for the Poccet Hood gang; and (8) "PHK," which stands for Poccet Hood Killer.

Based upon the police reports, FI cards, and tattoos, Deputy Giles opined that defendant is a member of the Carver Park Compton Crips. He testified that he reviewed photos of defendant from 2005, 2009, and 2014, and noted that defendant had more and more Carver Park gang-related tattoos as the years went by. The FI cards showed that defendant was associating with gang members, was in the Carver Park gang territory, and admitted to deputies that he was a gang member. The police report from the present case stated that he yelled out "Carver Park" during the commission of the crime, and police reports from another incident noted that defendant was associating with known gang members in the gang area, and that during that incident "Carver Park" was yelled out.

c. *Testimony Regarding Commission of the Crimes for the Benefit of the Gang*

The prosecution presented Deputy Giles with a hypothetical based on the facts of the case, and he opined that the shooting and possession of a firearm were committed for the benefit of the Carver Park gang. He explained that the perpetrator was going to benefit individually because he was committing a violent act, so his reputation within the gang would be enhanced. Also, by throwing out "Carver Park," the gang would benefit because he let his victims and any witnesses know that Carver Park has members who are violent and willing to shoot. Victims and/or witnesses might be intimidated by the gang, so they would be less likely to come forward. Finally, the shooting also would give rival gangs second thoughts about coming into Carver Park territory.

5. *Jury's Verdict*

On count 1, attempted murder of Peyton, the jury found defendant guilty, and found that the attempted murder was committed willfully, deliberately and with premeditation. The jury also found that defendant personally and intentionally used a handgun, and personally and intentionally discharged a handgun. (§ 12022.53, subds. (b), (c).) Finally, the jury found that the attempted murder was committed for the benefit of a criminal street gang.

On counts 4 and 6, assault with a firearm on Tramir and on Gaines, the jury found defendant guilty and found that he personally used a handgun (§ 12022.5, subd. (a)). However, the jury found the

allegation that defendant committed the assault for the benefit of a criminal street gang was not true.

On count 5, possession of a firearm by a felon, the jury found defendant guilty, and that the offense was committed for the benefit of a criminal street gang.

On count 7, assault with a firearm on Peyton, the jury found defendant guilty, that he personally used a firearm (§ 12022.5, subd. (a)), and that the offense was committed for the benefit of a criminal street gang.

C. *Motion for New Trial and Court Trial*

The jury verdicts were entered on June 29, 2016. The next day, the California Supreme Court issued its opinion in *Sanchez*, *supra*, 63 Cal.4th 665. Defendant filed a motion for new trial before the bifurcated court trial on the prior convictions allegations was held. The motion raised several grounds, including that the gang expert was allowed to testify based on inadmissible hearsay in contravention of *Sanchez*.

The hearing on the motion for new trial was held on the same day as the court trial. Both had been continued numerous times, and were not held for more than a year after the jury verdicts. The prosecutor who had tried the case was out on maternity leave, so a different prosecutor represented the People.

After addressing and denying the prosecution's request to amend the information to add a prior strike allegation, the court stated, "So now I think we're left with the court trial on the two 667.5(b) priors."

The prosecutor did not raise the need for the court also to address the out-on-bail allegations, even though all parties had agreed prior to trial that those allegations would be addressed with the prior prison term allegations in the bifurcated trial. Instead, the prosecutor submitted evidence -- two "969(b) packets" -- that went only to the prior prison term allegations. After reviewing the evidence, the court found that the two prior convictions were proven, and that the prior prison term allegations were true. The court then stated, "So unless anybody has anything they want to add to that, we would move on to the motion for a new trial." The prosecutor did not raise the out-on-bail allegations.

Addressing the new trial motion, the court agreed with defendant that some of the evidence presented by the gang expert violated *Sanchez*. The court presented three options: (1) the prosecution could dismiss the gang allegation (which would apply only to the counts involving Peyton, since the jury found the gang allegations in the counts involving Tramir and Gaines were not true); (2) the prosecution could oppose the dismissal and the court could grant a new trial; or (3) the court could excise the testimony it believed violated *Sanchez*.

The court noted that the jury could have determined that defendant was a gang member without the gang expert's testimony, based upon defendant's statement before he began shooting at Peyton and his tattoos. The only possible issue the court saw was with the predicate offenses. It observed that the admissible testimony regarding the first offender, Jackson, was sufficient because the expert testified that he had personal knowledge that Jackson was a member of the gang, but the court was concerned with the testimony regarding the

second and third offenders, Johnson and Thomas, because the expert's opinions as to those two came entirely from *Sanchez*-prohibited hearsay. The court concluded, however, that the predicate offenses could be established solely based upon the charges in the present case and Jackson's convictions. The court cautioned that, although it believed the evidence that was not prohibited by *Sanchez* was sufficient to establish the gang allegations, it did not know if the prosecution was willing to take the chance that an appellate court would disagree. The prosecutor stated that the People would stand on the non-prohibited evidence, and the court denied the new trial motion.

D. *Sentence*

The court sentenced defendant to a total sentence of 44 years and four months, plus 15 years to life in prison, computed as follows.

On count 1, an indeterminate term of 15 years to life for the attempted murder, plus 20 years for the firearm use allegation under section 12022.53, subdivision (c), plus two years for the out-on-bail allegation, plus one year for each of the two prior prison terms.

On count 4, the high term of four years for the assault with firearm, plus 10 years for the firearm use allegation under section 12022.5, subdivision (a). The court did not impose the out-on-bail or prior prison term enhancements with regard to this count.

On count 5, the midterm of two years for the possession of a firearm by a felon, plus three years for the gang allegation, to run concurrent with count 1. The sentence was stayed under section 654.

On count 6, one-third the midterm (i.e., one year) for the assault with a firearm, plus one-third (i.e., one year and four months) for the firearm use allegation, to run consecutive to each other and consecutive to count 1, plus two years for the out-on-bail allegations, plus one year for each of the two prison priors.

On count 7, the high term of four years on the assault with a firearm, plus 10 years for the gang allegation, plus 10 years for the firearm allegation under section 12022.5, subdivision (a), all of which was stayed under section 654.

DISCUSSION

A. *Sufficiency of the Evidence*

Defendant argues there is insufficient evidence to support the intent to kill required for the attempted murder convictions, the assault with a firearm convictions involving Tramir and Gaines, and the finding that the attempted murder was committed for the benefit of a criminal street gang. "'In considering a challenge to the sufficiency of the evidence to support [a conviction or] an enhancement, we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence -- that is, evidence that is reasonable, credible, and of solid value -- from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] We presume every fact in support of the judgment the trier of fact could have reasonably deduced from the evidence. [Citation.] If the circumstances reasonably justify the trier of fact's findings, reversal of the judgment is not warranted simply because the circumstances

might also reasonably be reconciled with a contrary finding.' [Citation.]" (*People v. Resendez* (2017) 13 Cal.App.5th 181, 187-188.) We conclude that substantial evidence supports all of the challenged convictions and the gang allegation finding.

1. *Attempted Murder*

Defendant correctly observes that attempted murder requires a specific intent to kill (citing *People v. Hajek and Vo* (2014) 58 Cal.4th 1144, 1192 and *People v. Ramos* (2011) 193 Cal.App.4th 43, 45), and that """"[t]he act of firing toward a victim at a close, but not point blank range "in a manner that could have inflicted a mortal wound had the bullet been on target is sufficient to support an inference of intent to kill."""""" (*People v. Virgo* (2013) 222 Cal.App.4th 788, 798.) He contends, however, that the evidence in this case was insufficient to find an intent to kill because defendant did not fire shots at close range, and Gaines gave an account in which she stated that the shots were fired at Peyton's feet rather than at any vital area of his body.

Defendant's characterization of the evidence ignores key evidence from which the jury could infer an intent to kill. First, although Peyton testified that defendant was around 22 feet from him when he fired the first shot, he also testified that defendant ran up to the back of Gaines's car while Peyton was at the front of the car, and fired at least one shot at him from that position. Shooting at someone across a car is sufficiently close range for a reasonable jury to infer an intent to kill. (See *People v. Jackson* (1989) 49 Cal.3d 1170, 1201.)

Second, although Gaines admitted that she told the prosecutor and the detective that defendant was aiming toward Peyton's feet, she testified that she could only see what was happening in the side view mirror, and was trying to duck down to avoid being shot. But more importantly, Peyton testified that he was looking directly at defendant, and that defendant was pointing the gun straight out toward him.

Finally, the 911 caller, who was relating information about the shooting as it was happening, reported that the shooter yelled from his car that he was going to kill Peyton. Based upon this evidence, a reasonable trier of fact could find that defendant intended to kill Peyton and was guilty of attempted murder.

2. *Assault With a Firearm*

Assault with a firearm requires proof of an assault and that it was accomplished by the use of a firearm. (§ 245, subd. (a)(2).) "An assault is an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another." (§ 240.) Assault is a general intent crime, and does not require a specific intent to injure the victim. (*People v. Williams* (2001) 26 Cal.4th 779, 788.) To be guilty of assault, the defendant "must be aware of the facts that would lead a reasonable person to realize that a battery would directly, naturally and probably result from his conduct. He may not be convicted based on facts he did not know but should have known. He, however, need not be subjectively aware of the risk that a battery might occur." (*Ibid.*) As the court of appeal in *People v. Felix* (2009) 172 Cal.App.4th 1618 observed, "[i]t follows from this objective standard that '[A]n intent to

do an act which will injure any reasonably foreseeable person is a sufficient intent for an assault charge.' [Citation.]" (*Id.* at p. 1628.)

In this case, defendant contends there was insufficient evidence to support the convictions of assault with a firearm on Tramir and Gaines because Tramir and Gaines were seated inside the car, and "the evidence failed to establish that it was reasonably foreseeable that [defendant's] firing at Peyton would cause harm to [them]." We disagree.

In *People v. Felix*, *supra*, 172 Cal.App.4th 1618, the appellate court affirmed the defendant's conviction for assault with a firearm on two children based upon his firing a gun into his target's master bedroom window, knowing it was highly likely that the two children were in the house. (*Id.* at pp. 1621, 1630.) The instant case presents even more compelling facts. Here, there was evidence that defendant followed Peyton, Gaines, and Tramir into the parking lot, and observed Peyton putting Tramir into the back seat of the car and Gaines getting into the driver's seat. Peyton was five to ten feet from the trunk of the car when defendant fired the first shot toward him from around 22 feet away. Peyton then ran to the front of the car and defendant ran to the back and fired again, across the car toward Peyton. This evidence is sufficient to support the jury's implied finding that defendant knew that Gaines and Tramir were close enough to be in the line of fire, and "thus knew that his acts would 'probably and directly result in physical force' against them." (*Id.* at p. 1630.)

3. *Gang Enhancement*

As noted, the jury found true the gang enhancement allegations under section 186.22, subdivision (b)(1) as to the attempted murder count, the possession of a firearm by a felon count, and the assault with firearm on Peyton count. "[S]ection 186.22(b)(1) . . . provides: '[A]ny person who is convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members, shall, upon conviction of that felony, in addition and consecutive to the punishment prescribed for the felony or attempted felony of which he or she has been convicted, be punished . . . .'" (*People v. Albillar* (2010) 51 Cal.4th 47, 59.)

Defendant contends there was insufficient evidence to support the jury's finding that the crimes at issue were committed for the benefit of a criminal street gang because "there was no evidence that the crime was motivated by the purpose of enhancing the gang's reputation and causing fear. [Instead, t]he genesis of the incident was a personal conflict, that is [defendant] standing up for his significant other in her argument with Peyton's female friend and the two men wanting to fight it out for their women, a strictly personal purpose." Once again, defendant ignores key evidence.

Evidence was presented that Peyton and defendant identified themselves to each other as members of rival gangs at their first meeting in March 2014. When they next met, Peyton expected they would engage in a war of words and a fist fight, and told defendant to put the gun down. Defendant responded by invoking the name of his

gang, saying, "On Carver Park, we ain't going to do too much talking." He then started shooting at Peyton.

The gang expert explained that "[r]eputation is huge for gangs. . . . Gang members in the gang, they want to be feared. With fear is respect. If they're feared by members of their own gang or by rival gangs . . . they feel like they could do more crime without any repercussions, people telling on them or retaliating towards them. Because if they're feared, then they're respected, because nobody would want to mess with them or their gang." The expert testified that gang members often instill this fear of the gang by yelling out the name of their gang while committing violent crimes.

The jury reasonably could infer from this evidence that defendant committed these crimes against Peyton for the benefit of the Carver Park criminal street gang.

B. *Sanchez Error*

As noted, to prove gang enhancement allegations, the prosecution must present evidence that the defendant committed "a felony . . . for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members." (§ 186.22, subd. (b)(1).) "'To establish that a group is a criminal street gang within the meaning of the statute, the People must prove: (1) the group is an ongoing association of three or more persons sharing a common name, identifying sign, or symbol; (2) one of the group's primary activities is the commission of one or more statutorily enumerated criminal

offenses; and (3) the group's members must engage in, or have engaged in, a pattern of criminal activity.' [Citation.] 'A "pattern of criminal gang activity" is defined as gang members' individual or collective "commission of, attempted commission of, conspiracy to commit, or solicitation of, sustained juvenile petition for, or conviction of two or more" enumerated "predicate offenses" during a statutorily defined time period. [Citations.] The predicate offenses must have been committed on separate occasions, or by two or more persons. [Citations.]'" (*People v. Ochoa* (2017) 7 Cal.App.5th 575, 581.) The requisite pattern may be established by evidence of the currently-charged offenses and one other predicate offense. (*People v. Gardeley* (1996) 14 Cal.4th 605, 625, disapproved on other grounds in *Sanchez*, *supra*, 63 Cal.4th at p. 686, fn. 13.)

In this case, defendant contends that reversal of the gang enhancement is required because admission of the gang expert's testimony regarding his membership, and the membership of the offenders in the predicate offenses, in the Carver Park gang violated his confrontation clause rights because the expert relied on hearsay statements that were inadmissible under *Sanchez*, *supra*, 63 Cal.4th 665. We find any error was harmless beyond a reasonable doubt.[10]

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[10] The Attorney General contends that defendant forfeited his *Sanchez* argument by failing to object to the gang expert's testimony on hearsay grounds. (Citing *In re Seaton* (2004) 34 Cal.4th 193, 198.) However, "[a]ny objection would likely have been futile because the trial court was bound to follow pre-*Sanchez* decisions holding expert 'basis' evidence does not violate the confrontation clause." (*People v. Meraz* (December 27, 2018, B245657) ___ Cal.App.5th ____ [p. 18, fn. 7].) Accordingly, we consider defendant's confrontation clause claim.

Sanchez held that state hearsay law permits an expert witness to refer generally to hearsay sources of information as a basis for the expert's opinion, but precludes experts from "rely[ing] on case-specific hearsay to support their trial testimony. [Citation.]" (*People v. Williams* (2016) 1 Cal.5th 1166, 1200.) "'Case-specific facts are those relating to the particular events and participants alleged to have been involved in the case being tried.' [Citation.]" (*People v. Burroughs* (2016) 6 Cal.App.5th 378, 406.)

Sanchez "adopt[ed] the following rule: When any expert relates to the jury case-specific out-of-court statements, and treats the content of those statements as true and accurate to support the expert's opinion, the statements are hearsay. It cannot logically be maintained that the statements are not being admitted for their truth. If the case is one in which a prosecution expert seeks to relate *testimonial* hearsay, there is a confrontation clause violation unless (1) there is a showing of unavailability and (2) the defendant had a prior opportunity for cross-examination, or forfeited that right by wrongdoing." (*Sanchez*, *supra*, 63 Cal.4th at p. 686, fn. omitted.) Thus, "a court addressing the admissibility of out-of-court statements must engage in a two-step analysis. The first step is a traditional hearsay inquiry: Is the statement one made out of court; is it offered to prove the truth of the facts it asserts; and does it fall under a hearsay exception? If a hearsay statement is being offered by the prosecution in a criminal case, and the *Crawford* [*v. Washington* (2004) 541 U.S. 36] limitations of unavailability, as well as cross-examination or forfeiture, are not

satisfied, a second analytical step is required. Admission of such a statement violates the right to confrontation if the statement is *testimonial hearsay*, as the high court defines that term." (*Sanchez*, *supra*, 63 Cal.4th at p. 680.)

In the present case, the gang expert testified that his opinions that Jackson, Johnson, Thomas, and defendant were members of the Carver Park gang were based, at least in part, on testimonial hearsay from police reports, discussions with other officers who investigated those crimes, and FI cards. As the Supreme Court explained in *Sanchez*, "[w]hen an expert relies on hearsay to provide case-specific facts, considers the statements as true, and relates them to the jury as a reliable basis for the expert's opinion, it cannot logically be asserted that the hearsay content is not offered for its truth." (*Sanchez*, *supra*, 63 Cal.4th at p. 682.) Thus, to the extent the gang expert relied upon that testimonial hearsay, that testimony violated *Sanchez*.

That some of the testimony violated *Sanchez* does not, however, require reversal in this case, because the gang expert *also* relied upon his personal knowledge as to the gang membership of at least one offender, and there was overwhelming admissible evidence of defendant's membership in the Carver Park gang. With regard to the offender Jackson, the gang expert testified that he based his opinion that Jackson was a member of the Carver Park gang primarily on his own personal contacts he had with Jackson. There is nothing in the record to indicate that the gang expert obtained information that Jackson is a gang member through *testimonial* hearsay during those

contacts. Thus, his reliance on those contacts to form his opinion did not violate defendant's confrontation clause rights under *Sanchez*.

Similarly, the gang expert testified that he based his opinion that defendant was a member of the Carver Park gang on defendant's tattoos, photos of which were authenticated and admitted into evidence for the jury to review. Moreover, independent admissible evidence -- Peyton's testimony that defendant told him he was a member of the Carver Park gang -- verified the gang expert's opinion.

In light of this admissible evidence of Jackson's and defendant's gang membership, we find that the admission of other *Sanchez*-prohibited testimony was harmless beyond a reasonable doubt.

C. *Prior Prison Term Enhancement*

As noted, the trial court imposed two prior prison term enhancements under section 667.5, subdivision (b), for counts 1 and 6. Those enhancements were based upon felony convictions in case Nos. NA066735 (grand theft) and TA105720 (assault with a deadly weapon).

On March 27, 2018, while this appeal was pending, defendant petitioned in case No. NA066735 for resentencing as a misdemeanor under Proposition 47, the Safe Neighborhoods and Schools Act (Proposition 47), which "reclassified as misdemeanors certain offenses that previously were felonies or 'wobblers,' . . . [and] permits those previously convicted of felony offenses that Proposition 47 reduced to misdemeanors to petition to have such felony convictions resentenced or redesignated as misdemeanors." (*People v. Buycks* (2018) 5 Cal.5th 857,

871 (*Buycks*).) The court in that case granted the petition on June 19, 2018.

On July 13, 2018, defendant filed a supplemental brief in this court, arguing that the one-year prior prison term enhancements related to the conviction in case No. NA066735 should be stricken because, under Proposition 47, that conviction is now a misdemeanor for all purposes. At the time defendant filed his supplemental brief, the law regarding the effect of resentencing under Proposition 47 on section 667.5, subdivision (b) enhancements was unsettled. However, as the Attorney General observes, the Supreme Court has now resolved the issue, and concluded that "Proposition 47's mandate that the resentenced or redesignated offense 'be considered a misdemeanor for all purposes' [citation] permits defendants to challenge felony-based section 667.5 . . . enhancements when the underlying felonies have been subsequently resentenced or redesignated as misdemeanors" (*Buycks*, *supra*, 5 Cal.5th at p. 871), and that this rule applies retroactively to all non-final judgments (*id.* at p. 883). Accordingly, we hold that the one-year prior prison term enhancements related to case No. NA066735 must be stricken.

D. *Out-on-Bail Enhancement*

In the respondent's brief, the Attorney General noted that the trial court imposed two two-year out-on-bail enhancements even though it did not make any findings to support those enhancements. Thus, the Attorney General asserts that the matter should be remanded to the trial court to conduct further proceedings as to those enhancements.

(Citing *People v. Monge* (1997) 16 Cal.4th 826, 845 for the proposition that double jeopardy does not apply to retrial of a sentence enhancement allegation.)

Defendant argues that the prosecution is not entitled to further proceedings because the record indicates that the prosecutor did not present any evidence to prove the enhancements at the priors trial. In making this argument, defendant relies upon cases in which courts refused to allow a retrial on enhancements that had not been pleaded and proven at trial. (Citing *People v. Mancebo* (2002) 27 Cal.4th 735, 754; *People v. Najera* (1972) 8 Cal.3d 504; *People v. Anderson* (1975) 50 Cal.App.3d 325.)

The Attorney General is correct that double jeopardy does not preclude retrial of sentence enhancements that are reversed for insufficient evidence in noncapital cases. (*Monge v. California* (1998) 524 U.S. 721, 734; *People v. Monge*, *supra*, 16 Cal.4th at p. 845.) Nor does the due process clause preclude retrial under those circumstances. (*People v. Barragan* (2004) 32 Cal.4th 236, 244-245.) Defendant also is correct that retrial is precluded when the sentencing enhancements were not pleaded and proven at trial, because the prosecution is deemed to have waived the enhancements. (*People v. Najera*, *supra*, 8 Cal.3d at pp. 509, 512.) But neither side's case law is precisely on point here.

Unlike the *Monge* cases, in this case there was not insufficient evidence, there was *no* evidence presented to support the out-on-bail enhancement allegations. And unlike *People v. Najera*, in this case the prosecution did plead the out-on-bail enhancements, and the parties

specifically agreed to try those enhancements with the bifurcated priors trial; the new prosecutor simply neglected to address them when the long-delayed priors trial took place more than a year after the first part of the trial.

In light of the fact that the enhancements in this case were pleaded and it was agreed by all parties they were to be tried in the priors trial, and the fact that defendant did not raise the failure of proof in his appellant's opening brief, we decline to find that the prosecution waived the enhancements. Therefore, we remand the matter to the trial court to conduct further proceedings as to the out-on-bail enhancements.

E. *Remand for Resentencing as to Firearm Enhancements*

As noted, the trial court imposed firearm enhancements under sections 12022.53, subdivision (c), and 12022.5, subdivision (a) when defendant was sentenced on August 3, 2017. At that time, trial courts had no authority to strike firearm enhancements proven under those statutes. However, Senate Bill No. 620, which became effective on January 1, 2018, amended sections 12022.53 and 12022.5 to give courts authority to exercise discretion to strike or dismiss enhancements under those sections.

As the Attorney General concedes, these amendments apply retroactively to defendant, whose judgment of conviction was not final when the legislation became effective. (See *People v. Brown* (2012) 54 Cal.4th 314, 324 [interpreting *In re Estrada* (1965) 63 Cal.2d 740 as "articulating the reasonable presumption that a legislative act

mitigating the punishment for a particular criminal offense is intended to apply to all nonfinal judgments"]; *People v. Francis* (1969) 71 Cal.2d 66, 77 [amendment changing punishment for narcotics offense applied retroactively to cases not final on appeal]; see also *People v. Vieira* (2005) 35 Cal.4th 264, 306 ["'for the purpose of determining retroactive application of an amendment to a criminal statute, a judgment is not final until the time for petitioning for a writ of certiorari in the United States Supreme Court has passed'"].) As the Attorney General also concedes, we must remand the case for the trial court to exercise its discretion whether to strike the firearm enhancements.

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DISPOSITION

The one-year prior prison term enhancements under section 667.5, subdivision (b), related to defendant's conviction in case No. NA066735, imposed in counts 1 and 6 are stricken. The matter is remanded to the trial court to conduct further proceedings as to the out-on-bail enhancements under section 12022.1, and to consider whether to exercise its discretion to strike or dismiss the firearm enhancements under sections 12022.53 and 12022.5. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

WILLHITE, J.

We concur:

MANELLA, P. J.

MICON, J.*

*Judge of the Los Angeles County Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.